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BEFORE the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Petition of U S West Communications, Inc. )  
for Forbearance from Regulation as a )  
Dominant Carrier in the Seattle, Washington MSA )

CC Docket No. 99-1

OPPOSITION OF  
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION/AMERICA'S CARRIERS  
TELECOMMUNICATION ASSOCIATION

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ASSOCIATION/AMERICA'S CARRIERS  
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## SUMMARY

### Competitive Telecommunications Association/America's Carriers

Telecommunication Association ("Comptel/ACTA") strongly opposes U S West's petition for forbearance from regulation as a dominant carrier in the provision of high capacity services in the Seattle, Washington MSA. U S West's petition fails to demonstrate that U S West lacks market power in the Seattle MSA, and, if granted, would provide U S West with the unique ability and incentive to engage in cross-subsidization and other discriminatory behavior to the detriment of competition, and ultimately consumers.

U S West erroneously equates its decline in retail market share with a loss of market power. Indeed, despite a decrease in retail market share, U S West, by its own admission, still controls nearly 73% of the overall market for high capacity services. The Commission has repeatedly rejected requests for reclassification as non-dominant where the carrier continues to have facilities-based market share as high as 73%, especially where, as in the case of U S West, the carrier controls bottleneck facilities. So long as U S West has market power over high capacity services, it would be premature to reclassify U S West as a non-dominant carrier for that market segment.

Likewise, the Commission must deny U S West's request for non-dominant status until the Seattle high capacity market is fully competitive. By its petition, U S West requests deregulation for the entire MSA, while conceding that a significant portion of its high capacity network in Seattle is not yet subject to competition from alternative networks. U S West attempts to support its unripe request for reclassification by arguing that with a "minimal" investment ranging from \$46 million to \$110 million, competitors could build-out facilities to

accommodate customer locations within a short period of time. These arguments, however, are mere speculation. As Comptel/ACTA has stated in the past, the Commission must deny U S West's petition until it can demonstrate actual, as opposed to theoretical, facilities-based competition in the Seattle MSA.

Grant of the forbearance request also would permit U S West to engage in cross-subsidization. The underlying network that U S West uses to provide its high capacity services is the identical network used by US West to provide monopolistic local exchange and exchange access service. Reclassification as non-dominant would permit U S West to subsidize high capacity services in Seattle with monopoly revenue from services provided elsewhere in the state.

Finally, forbearance from dominant carrier regulation would only provide U S West with additional incentive *not* to comply with Section 251(c) of the 1996 Act. U S West's petition for forbearance is merely one more attempt by U S West to seek deregulation without having met the requirements for local market competition. Accordingly, the Commission must deny U S West's request for forbearance until U S West opens its local markets to competition in the manner prescribed by the 1996 Act.

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**Before the  
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To: The Commission

**OPPOSITION OF  
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION/  
AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION**

Competitive Telecommunications Association/America's Carriers

Telecommunication Association ("Comptel/ACTA"),<sup>1</sup> by its attorneys, hereby opposes U S West Communications, Inc.'s ("U S West") petition for forbearance from regulation as a dominant carrier in the provision of high capacity special access and dedicated transport for switched access ("high capacity") services in the Seattle, Washington MSA.<sup>2</sup> Specifically, by its petition, U S West requests that the Commission forbear from enforcing Part 61 of its Rules to U S West as they apply to dominant carriers, as well as any other rules affecting high capacity services which result in different regulatory treatment for dominant and non-dominant carriers.

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<sup>1</sup> Comptel/ACTA is the principal national industry association representing competitive telecommunications carriers and their suppliers. Comptel/ACTA's over 300 plus members include large nationwide companies as well as scores of smaller regional carriers.

<sup>2</sup> *Pleading Cycle, Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier for High Capacity Services in the Seattle, Washington Metropolitan Statistical Area*, CC Docket No. 99-1, Rel. January 4, 1999.

As an initial matter, Comptel/ACTA is concerned that U S West's request for relief is overbroad. While at first glance U S West's petition appears to be limited to high capacity services, which under U S West's definition includes high capacity special access and dedicated transport for switched access, various statements in the petition could be interpreted to extend beyond that market segment. Of utmost concern is U S West's nebulous request that the Commission forbear from enforcing "*any* other rules affecting high capacity services which result in different regulatory treatment for dominant and non-dominant carriers."<sup>3</sup> Taken literally, grant of this request would modify U S West's regulatory status beyond high capacity services that operate at DS-1 or higher transmission speeds and also include all types of switched access.<sup>4</sup> Thus, Comptel/ACTA believes that it is important that the Commission clearly establish the scope of this proceeding and limit its analysis to high capacity special access and dedicated transport for switched access services that operate at DS-1 and higher transmission speeds.

In any event, Comptel/ACTA strongly opposes U S West's petition for forbearance from dominant regulation. As discussed in greater detail below, despite the Commission's past and continuing efforts to introduce competition in the local services market in the manner prescribed by the Telecommunications Act of 1996 ("1996 Act"), genuine competition has yet to materialize. To the contrary, U S West continues to monopolize the facilities-based market segment for high capacity services in the Seattle, Washington MSA. Accordingly, the statutory criteria for forbearance are not met in the existing market for high

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<sup>3</sup> *U S West Petition* at 1 (emphasis added).

<sup>4</sup> Comptel/ACTA also is concerned that the Quality Strategies study used by U S West to demonstrate declining market share, in addition to DS-1 and DS-3 circuits, also includes DS-0 circuits, which U S West specifically exempts from its request for non-dominant classification. Comptel/ACTA submits that before the Commission can make a determination in this proceeding, U S West must be required to submit data that  
(continued...)

capacity services and the Commission must deny U S West's request for reclassification as a non-dominant carrier.

**I. U S WEST FAILS TO DEMONSTRATE THAT FORBEARANCE IS REQUIRED UNDER SECTION 10 OF THE 1996 ACT**

The three-part test set forth by Congress in Section 10 requires the Commission to premise forbearance on a finding that enforcement of a statute or regulation is no longer necessary to guard against discriminatory behavior, protect consumers and further the public interest.<sup>5</sup> Specifically, pursuant to Section 10(a) of the 1996 Act, the Commission may grant U S West's request for forbearance from dominant carrier regulation only upon a finding that:

- (1) enforcement of dominant carrier regulations is not necessary to ensure that U S West's charges and practices are just, reasonable and nondiscriminatory;
- (2) enforcement of dominant carrier regulations is not necessary to protect consumers; and
- (3) forbearance from enforcing dominant carrier requirements is consistent with the public interest.<sup>6</sup>

In addition, in determining whether forbearance is in the public interest under subsection (3), the Commission must consider whether forbearance will promote competitive market conditions and otherwise enhance competition among carriers in the Seattle MSA.

Inherent in each prong of the Section 10 forbearance test is a Congressional charge that the Commission find that enforcement of the statute, rule or regulation at issue is no longer necessary because the goals set forth therein already have been achieved. U S West in its

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(...continued)

demonstrates its actual market share for the services for which regulatory relief is requested, including data demonstrating market share based on revenue.

<sup>5</sup> See 47 U.S.C. §§ 160(a)-(b).

<sup>6</sup> *Id.* at 160(a)(1)-(3).

petition fails to demonstrate any changed circumstances in the current regulatory environment that would warrant forbearance under the statute. Instead, U S West's petition clearly demonstrates continued dominance in the market for high capacity services and control over monopoly local bottleneck facilities in the Seattle MSA. U S West has the unique ability and incentive to engage in cross-subsidization and other discriminatory behavior to the detriment of competition and, ultimately, consumers. As a result, U S West has not met the statutory criteria for forbearance and its petition must be rejected.

## **II. U S WEST CONTINUES TO ENJOY MARKET POWER IN THE SEATTLE, WASHINGTON MSA**

In order to grant U S West's petition for forbearance, the Commission must find that U S West lacks market power in the Seattle MSA. Market power exists when a carrier has the ability to raise prices by restricting output of its services,<sup>7</sup> or when a carrier has sufficient control over the underlying facilities to enable it to discriminate against competing retail providers.<sup>8</sup> When a carrier has market power, particularly when it has a high market share and controls bottleneck facilities, the Commission has consistently imposed dominant carrier regulations.

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<sup>7</sup> See *Cable & Wireless, Inc.; Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Provide Resold and Facilities-Based Switched and Private Line Services between the United States and Russia and to Be Held Non-Dominant for All Services on This Route*, 1998 FCC Lexis 1561, ¶ 6 (April 2, 1998).

<sup>8</sup> See *ntta.com, inc.; Application for Authority under Section 214 of the Communications Act of 1934, as Amended, to Resell Non-Interconnected Private Line Services between the United States and Japan*, 1998 Lexis 313 at ¶ 6 (January 26, 1998). In addition to market share, the Commission's market power analysis focuses on: (1) supply elasticity of the market; (2) demand elasticity of the customers; and (3) the carrier's cost structure, size and resources.



In its petition, U S West claims that its has lost market power despite the fact that, by its own admission, it still controls approximately 73% of the overall market for high capacity services.<sup>9</sup> In the past, the Commission has reclassified carriers as non-dominant only under limited circumstances. In no instance has the Commission found a carrier to lack market power where it has a facilities-based market share as high as 73%, especially where, as in the case of U S West, the carrier controls bottleneck facilities. In a previous case involving high-capacity services, the Commission found a carrier with similar market share to be a dominant carrier. In that case, the Commission classified a foreign-affiliated U.S. carrier as dominant based upon the Commission's view that its foreign parent possessed market power over international private lines ("IPLs"). Even though the foreign parent did not control bottleneck local exchange facilities, the Commission found the parent to have market power due in part to its estimated 75% share of the IPL market based on revenue (60% when measured by capacity), which the Commission found to be "relatively high."<sup>10</sup> Here, where U S West controls 73% of the facilities-based high capacity market in conjunction with its control over bottleneck local exchange facilities in Seattle, there is no reasonable basis for reclassifying U S West as a non-dominant carrier in that market segment.

Erroneously, U S West relies on the Commission's reclassification of AT&T as a non-dominant carrier to support its claim for non-dominant status. However, in granting AT&T's request for non-dominant status in the domestic interexchange market, the Commission expressly relied upon the fact that AT&T no longer controlled bottleneck local exchange

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<sup>9</sup> See *U S West Petition* at 22.

<sup>10</sup> *KDD America, Inc.; Application for Authority under Section 214 of the Communications Act of 1934, as amended, to Resell Non-Interconnected Private Line Services between the United States and Various International Points*, 11 FCC Rcd 11329, ¶12 (1996).

facilities.<sup>11</sup> In particular, the Commission focused on the fact that “AT&T ha[d] not controlled local bottleneck facilities for over ten years.”<sup>12</sup> Of course, U S West’s request is different because it continues to control bottleneck local exchange facilities while maintaining a dominant market share over facilities-based high capacity services. Thus, rather than support U S West’s petition, the decision to reclassify AT&T as non-dominant illustrates the Commission’s reluctance to classify carriers that control bottleneck facilities as non-dominant.

Perhaps recognizing the weakness in its argument, U S West argues that its dominance of high capacity facilities in Seattle does not constitute market power because it allegedly controls only 20% of the retail high capacity market. The Commission, however, must not be beguiled by U S West’s attempts to re-characterize the issues germane to this proceeding. The fact remains that U S West maintains monopoly control over facilities used to provide high capacity services. Control of high-capacity facilities, not retail market share, is the most telling indicator of market power, particularly given U S West’s continuing control over the broader local exchange bottleneck in Seattle. Indeed, if U S West is correct that the high capacity market segment in Seattle is characterized by high demand elasticity, then it could easily increase its retail market share significantly in a relatively short period of time through relatively modest retail pricing and marketing adjustments.<sup>13</sup> The Commission should not rely primarily upon market share data that are subject admittedly to such volatility when assessing an incumbent

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<sup>11</sup> See *In the Matter of Motion of AT&T to Be Reclassified as A Non-Dominant Carrier*, 11 FCC Rcd 3271, 3308 (1995).

<sup>12</sup> *Id.*

<sup>13</sup> See *U S West Petition* at 25. Likewise, U S West’s claim that the Seattle market for high capacity services is subject to high supply elasticity is overstated. Many U S West wholesale customers are subject to long-term agreements and high termination penalties. Thus, even if customers wanted to switch carriers it would be prohibitively costly to do so.

LEC's market power. So long as U S West presently has market power over high capacity facilities in Seattle, it would be premature to reclassify U S West as a non-dominant carrier for high capacity services.

### **III. THE POTENTIAL FOR MARKET EXPANSION IN THE SEATTLE MSA IS YET ANOTHER EXAMPLE OF U S WEST'S MARKET POWER**

U S West concedes that, from a geographic perspective, a significant portion of its high capacity network in Seattle is not yet subject to competition from competitive local exchange carriers ("CLECs").<sup>14</sup> Yet, U S West is seeking deregulation today for the entire Seattle MSA, not just those areas where it faces competition from alternative networks. Plainly, U S West's current 73% market share indicates that the CLECs' facilities-based inroads into U S West's monopoly over high capacity transmissions are still in their infancy. Thus, a request for non-dominant treatment is not only premature at this time, it is overbroad in light of the insignificant geographic penetration captured by CLECs in Seattle. The Commission must deny U S West's request for non-dominant status until the Seattle high capacity market is fully competitive.

U S West claims that with investments of \$46 million and \$110 million, competitors in the Seattle market can easily acquire or build additional facilities to accommodate all customer locations within 1,000 and 9,000 feet, respectively, of U S West's existing fiber networks in a relatively short period of time.<sup>15</sup> Comptel/ACTA submits that U S West's arguments about how quickly CLECs could expand into the Seattle market and the "low" costs

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<sup>14</sup> See *id.* at 13, 26.

associated with such build-out are mere speculation. In fact, the Quality Strategies study acknowledges that "the time required to build to different sites may vary significantly" and are dependent upon a number of factors including site conditions, availability of labor and equipment and receipt of the requisite permits and franchises.<sup>16</sup> In addition, quick build-out depends upon cooperation from U S West to obtain collocation, unbundled network elements and other forms of interconnection to provide service -- to which U S West has been resistant in the past.

As Comptel/ACTA has stated in past proceedings, the Commission should adopt a "show-me" approach and deny U S West's petition until it can show actual (as opposed to theoretical) facilities-based competition in the Seattle MSA to justify reclassification as a non-dominant carrier.<sup>17</sup> Indeed, the premature deregulation of U S West in Seattle could provide a disincentive for CLECs to build-out their high capacity networks in the MSA. Simply put, if U S West is willing and able to charge below-cost rates for deregulated high capacity services, the CLECs currently operating in Seattle may be reluctant to invest the \$46 million let alone \$100 million (according to U S West estimates) necessary to serve most of the Seattle market because they can obtain better returns by investing that capital in other markets where expansion is needed just as urgently. As a result, Seattle customers will be less likely to benefit from the

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(...continued)

<sup>15</sup> *Id.* at 5, 27.

<sup>16</sup> *Id.*, Seattle Forbearance Study at 15.

<sup>17</sup> See *Opposition of Competitive Telecommunications Association, In the Matter of the Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier for High Capacity Dedicated Transport Services in Specified MSAs*, CC Docket No. 98-277 at 7 (filed Jan. 21, 1999); *Opposition of Competitive Telecommunications Association, In the Matter of the Petition of U S West Communications for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket No. 98-157 at 7 (filed Oct. 7, 1998).

selection of carriers and lower prices that arise from competition if the Commission grants U S West's request for forbearance.

#### **IV. NON-DOMINANT STATUS WOULD ENABLE U S WEST TO CROSS-SUBSIDIZE HIGH CAPACITY SERVICES**

##### **A. U S West Would Engage In Harmful Cross-Subsidies**

U S West completely ignores the issue of cross-subsidization except to place the potential for such behavior on its non-dominant competitors.<sup>18</sup> Despite U S West's unwillingness to address cross-subsidization, it is a serious concern. The underlying network that U S West uses to provide its high capacity services is the exact same network that it uses to provide monopolistic local exchange and exchange access services. Control over such facilities provides U S West with both the opportunity and incentive to engage in harmful cross subsidies.

One group that is sure to suffer from cross-subsidies are small interexchange carriers ("IXCs"). As Comptel/ACTA has stated many times in the past, incumbent LECs offer two types of transport – direct-trunked and tandem-switched transport – over the same interoffice transport network.<sup>19</sup> Small IXCs depend upon U S West's tandem-switched transport for a high percentage (in some cases 100%) of their traffic, while the largest IXCs can use direct-trunked transport for a substantial percentage of their traffic in Seattle. In its petition, U S West is asking to have direct-trunked transport deregulated, implicitly conceding that it retains market power over tandem-switched transport. Were the Commission to grant U S West's request, U S West

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<sup>18</sup> See *U S West Petition* at 28.

<sup>19</sup> See, e.g., *Expedited Petition for Reconsideration of Competitive Telecommunications Association; In re Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72 at 18 (Filed July 11, 1997).

would have both the opportunity and incentive to use its captive tandem-switched customer base to cross-subsidize some or all of its direct-trunked transport offerings in Seattle. This would result in even higher rates for tandem-switched transport users and an uneconomic access cost advantage for the largest IXC's who can benefit from U S West's direct-trunked transport offerings. Such cross-subsidies would undermine competitive conditions in the markets for interexchange and one-stop-shopping services and result in higher rates and fewer choices for consumers.

Other types of cross-subsidies are easy to imagine. For example, U S West desires forbearance relief to eliminate the prohibition against rate deaveraging for high capacity services within Washington. Were the Commission to grant such relief, U S West could subsidize high capacity services in Seattle, one of the major service areas in the state, with monopoly revenues from high capacity and other services in the rest of the state. Similarly, U S West could engage in other cross-subsidies within the Seattle MSA. U S West concedes that there are significant geographic portions of the Seattle MSA where facilities-based CLEC competition does not now exist. U S West could increase its rates for high capacity and other local services in those parts of Seattle in order to subsidize high capacity services in areas served by facilities-based CLECS.

**B. U S West Could Use This Opportunity to Circumvent Section 251(c) of the 1996 Act**

Forbearance from dominant regulation also would give U S West an additional incentive not to comply with Section 251(c) of the 1996 Act. As the Commission is fully aware, U S West has refused to open its local monopoly to competition in compliance with Section 251 of the 1996 Act and the Commission's rules implementing that section. Deregulating

U S West's high capacity services in Seattle would only give U S West another reason to avoid complying with the market-opening provisions in the 1996 Act. If granting the petition would enable U S West to tap its existing market power over local services to subsidize high capacity services in Seattle, then it would fight even harder to retain that local market power against competitive inroads by new entrants as contemplated by Section 251(c). The Commission should not be giving U S West an additional incentive to avoid complying with its statutory obligations. Forbearance from dominant regulation would in no way enhance competition and would only provide an additional mechanism for U S West to thwart competition in the local services market.

In filing its petition for forbearance, U S West's concern appears not to be that it has lost market power, which it obviously has not, but rather that it has lost some share of the retail high capacity market. However, even if U S West's statistics are correct and the competitive providers' market share increased in the second half of 1997, this increase was not so significant as to warrant a reclassification of U S West's high capacity services. Forbearance from dominant carrier regulation cannot be brought about due to a mere decline in retail market share, but can be justified only based upon structural changes in the market that show the incumbent LEC to be on a competitive par with other competitors in the market. U S West has not made such a showing for the Seattle market, and its petition must be rejected.

**V. CONCLUSION**


For the reasons stated herein, Comptel/ACTA submits that the Commission should deny U S West's petition for forbearance from regulation as a dominant carrier in the Seattle, Washington MSA.

Respectfully submitted,

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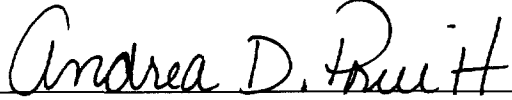
## CERTIFICATE OF SERVICE

This is to certify that I have on this 18th day of February 1999, served copies of the foregoing **OPPOSITION OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION/AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION** upon all known parties of record, by depositing same in the United States Mail, addressed as follows:

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